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Wednesday, February 6, 2002

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In re

ALDER BAY, INC.,

No. 01-10175

[Debtor](#) ⓘ(s).

_____/

CHARLES SIMS, [Trustee](#) ⓘ,

[Plaintiff](#) ⓘ(s),

v.

A.P. No. 01-1125

GRACECO CONSTRUCTION, INC.,

[Defendant](#) ⓘ(s).

Memorandum on Request For Relief From Default

During 2001, Donald O. Grace filed a personal [Chapter 7](#) ⓘ petition and a Chapter 7 petition for his wholly-owned corporation, Alder Bay, Inc. However, he did not file a petition for another wholly-owned corporation, Graceco Construction, Inc.

Plaintiff Charles Sims is the Chapter 7 trustee for Alder Bay, Inc. After reviewing its records, he determined that Grace had transferred \$122,000.00 from Alder Bay to Graceco, mostly during the year prior to Alder Bay's bankruptcy. Alleging that these payments were either preferential or fraudulent, he commenced this [adversary proceeding](#) ⓘ to recover them for the Alder Bay estate.

Graceco was served by mail in accordance with FRBP 7004(b)(3) as follows:

Donald O. Grace
Agent for Service of Process
Graceco Construction, Inc.
1845 S Street
Eureka, CA 95501

When no answer was filed, Graceco's default was entered and Sims obtained a default judgment. Graceco now seeks relief from its default.


Graceco admits that service was proper. However, Donald Grace had moved from the S Street property some months before, but had not updated the corporate information listed with the California Secretary of State. At the time of service his son, Robert Grace, was living at the S Street address. Robert Grace was also an employee of Graceco.

Graceco has submitted declarations alleging that the payments made to it from Alder Bay were for services and accordingly not fraudulent. However, these claims are not backed by any documents or other evidence and are less than compelling. Moreover, its only defense to the preference allegations is based on the incorrect assumption that the one-year insider preference period is not applicable. All but \$11,000.00 was received by Graceco within the preference period.

Graceco had a duty under California law to keep its Secretary of State informed of its correct address for service of process. Its failure to do so was conduct which hindered judicial proceedings. This is culpable misconduct, and is a basis for denying relief from default. *Gregorian v. Izvestia*, 871 F.2d 1515, 1525, 13 Fed.R.Serv.3d 1030 (9th Cir. 1989); *Pena v. Seguros La Commercial. S.A.*, 770 F.2d 811 (9th Cir. 1985).

The court is mindful that there is a strong policy in favor of trials on the merits. However, after considering all of the facts and circumstances the court is convinced that this is one of those rare cases where relief from default should not be permitted. Accordingly, the motion for relief from default will be denied. Counsel for plaintiff shall submit an appropriate form of order.

Dated: February 6, 2002

Alan Jaroslovsky
U. S. [Bankruptcy Judge](#) 

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